Supreme Court, U.S.
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No. 99-531

In The

Supreme Court of the United States

L.M.M.,

Petitioner,

v.

E.N.O.,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Judicial Court Of Massachusetts

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Whether the Supreme Judicial Court of the Commonwealth of Massachusetts violated the Separation of Powers doctrine of the Massachusetts Declaration of Rights by granting, pursuant to its statutory equitable jurisdiction but without particular statutory authority, temporary visitation between the Petitioner's biological child, properly in the care of the Petitioner, and the Respondent, whom the Court found is a de facto parent of the child.

II. Whether the Supreme Judicial Court of the Commonwealth of Massachusetts violated the Petitioner's fundamental right to rear her biological child without State interference by finding, without Petitioner's consent, that it was in the best interests of the child to have temporary visitation with the Respondent, who is a state-declared de facto parent.

III. Whether the lower court violated the Petitioner's Due Process rights by preventing the Petitioner the right to conduct an evidentiary hearing and the right to cross-examine the guardian ad litem before the court granted temporary visitation between the Petitioner's biological child and the Respondent, a state-declared de facto parent.

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JURISDICTION

There is no "final judgment or decree" within the meaning of 28 U.S.C. § 1257 for this Court to review where the case below affirms an interlocutory order for temporary visitation and where further proceedings continue in the state courts.

RESTATEMENT OF THE CASE

The parties are two women who met in 1984 and shared a committed, monogamous relationship for thirteen years until their separation in May, 1998. App. 2, 4.[1] During their relationship, the parties availed themselves of every known legal mechanism for signifying their commitment to each other as "life partners." App. 2.

They dreamed of becoming parents from the time they met and, in 1991, decided to have a child biologically. App. 2. The parties decided that Petitioner – the older of the two women – would become pregnant through artificial insemination, and that Respondent would bear their second child. App. 2. Before the insemination process began, the parties attended workshops to learn about artificial insemination and parenting issues. App. 2. E.N.O. attended and participated in all of the insemination sessions as well as all medical decisions. App. 2.

[1] All references to the Appendix are to the Appendix contained in the Petition for Writ of Certiorari.

While the parties were still living in Maryland, L.M.M. became pregnant with B.O.M. in 1994. App. 2. Throughout L.M.M.'s difficult pregnancy, E.N.O. cared for her and accompanied L.M.M. on every visit with her doctors. App. 2-3.

When the child was born in February, 1995, E.N.O. acted as L.M.M.'s birthing coach and cut the child's umbilical cord. App. 3. Hospital staff treated E.N.O. as a mother, giving her a bracelet denoting her as a parent of "Baby O.-M.". App. 3.

B.O.M.'s last name consists of the parties' last names, and the parties sent out birth announcements naming them both as parents. App. 3. His first and middle names are for deceased relatives in E.N.O.'s family in accord with Jewish tradition. The child was welcomed into E.N.O.'s family as the first grandchild.

Before the child was born, and again afterward, the parties executed a co-parenting agreement in which they expressly stated their intent to co-parent the child. App. 3. The Agreement expressly acknowledged the possibility of the parents' separation and stated their intent that E.N.O. would continue to remain the child's parent even if L.M.M. and E.N.O. were to separate. App. 3. L.M.M. also executed documents authorizing E.N.O. to care for B.O.M. and act as a parent with respect to third parties. App. 3.

After B.O.M.'s birth, E.N.O. assumed most of the household and financial responsibilities. Later, for a seven-month period, E.N.O. was also the child's primary caretaker because L.M.M. was experiencing medical problems. The child, who is now approaching his fifth

birthday, calls E.N.O. "Mommy" and L.M.M. "Mama." He tells people that he has "two mothers". App. 3.

In September 1997, the couple moved to Massachusetts (App. 4), because it is a state where E.N.O. could legally become an adoptive parent without L.M.M. terminating her parental rights. In the Spring of 1998, however, the parties' relationship began to deteriorate. App. 4. After E.N.O. called an attorney about proceeding with a joint adoption, L.M.M. became angry and refused to meet with the attorney. The couple separated in May, 1998, and from that point forward L.M.M. sought to deny E.N.O. any access to the child. App. 4.

In June, 1998, L.M.M. obtained an ex parte temporary restraining order against E.N.O. pursuant to MASS. GEN. L. ch. 209A. Also in June, E.N.O. filed a complaint seeking enforcement of the co-parenting agreement, visitation with the child, and a winding down of the parties' financial affairs. App. 4.

In July, 1998, after a lengthy hearing in which the Probate and Family Court Judge questioned the parties and their attorneys, the temporary ex parte restraining order against E.N.O. was dismissed. A guardian ad litem appointed by the court also determined that E.N.O. posed no risk at all to the child.

Both the guardian ad litem as well as the attorney appointed to represent the child's interests concurred that E.N.O. acted in a parental capacity toward the child and that temporary visitation with her was in B.O.M.'s best interests. The guardian ad litem found that E.N.O. was an active parent and that "both mothers were clearly involved in [the child's] upbringing." App. 4-5. A judge

of the Probate and Family Court of Massachusetts ("Family Court") then ordered temporary visitation between the child and E.N.O., finding that such temporary visitation was in his best interests. App. 4.

L.M.M. availed herself of the Massachusetts statutory procedures for review of an interlocutory order. She first sought review by a single justice of the Massachusetts Appeals Court pursuant to MASS. GEN. L. ch. 231, § 118 (1st para.). The Single Justice of the Appeals Court vacated the Family Court order. App. 67-68. E.N.O. then sought review by a single justice of the Massachusetts Supreme Judicial Court ("SJC") pursuant to MASS. GEN. L. ch. 211, § 3. The SJC Single Justice agreed with the Family Court and reinstated visitation. App. 69-70. Upon further appellate review to the full SJC, four justices agreed with the Single Justice of that court and the Family Court ruling that the Probate and Family Court properly awarded temporary visitation to E.N.O. App. 5, 11. More particularly, the majority of the SJC agreed that the Family Court acted within its broad equitable jurisdiction which jurisdiction extended to awarding visitation between the child and E.N.O., whom it found to be B.O.M.'s de facto parent. App. 11.

REASONS FOR DENYING THE WRIT

I. NO FINAL DECISION EXISTS WHERE THE VISITATION ORDER AT ISSUE IS INTERLOCUTORY AND TEMPORARY.

This Court may not review the judgment below where it is not a final judgment or decree. 28 U.S.C.

§ 1257. Here, the rights of the parties have not been fully adjudicated and the Massachusetts courts have not concluded with the matter. *Market St. Ry. v. Railroad Comm'n*, 324 U.S. 548, 551, 65 S.Ct. 770, 772-73 (1945); *Dept. of Banking v. Pink*, 317 U.S. 264, 268, 63 S.Ct. 233, 235 (1942). In upholding an interlocutory visitation order for three hours per week of contact between E.N.O. and the child (App. 71), the SJC emphasized that "[t]he visitation order is temporary and may be altered or even vacated on a trial on the merits." App. 16 n.13.

Facts remain to be developed which would clarify or eliminate any constitutional issues. *Minnick v. Cal. Dept. of Corrections*, 452 U.S. 105, 127, 101 S.Ct. 2211, 2223 (1981). The proceedings now pending before the Family Court could reveal, for example, that L.M.M. is physically unable to care for the child at all. The finality rule bars this Court's piecemeal review of this case and must deter this Court from revisiting the SJC's determination of the issues. *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159, 94 S.Ct. 407, 410 (1973). In short, this Court has no role to play until the Massachusetts courts finally resolve the underlying matter.[2]

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[2] This Court should not hold this case pending its determination in *Custody of Smith*, 137 Wash.2d 1 (1998), *cert. granted sub nom. Troxel v. Granville*, 68 U.S.L.W. 3175 (U.S. Sept. 28, 1999) (No. 99-138). The decision below is not final and *E.N.O.*, unlike any issues raised in *Troxel*, involves a conflict between two parents. *See* Section III, below.

II. THE SEPARATION OF POWERS ISSUE SET FORTH IN QUESTION ONE WAS NEITHER RAISED NOR DECIDED BELOW, DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION AND IS MERITLESS.

This Court will not consider an issue that was neither raised below nor considered or decided by the Massachusetts Supreme Judicial Court. *McGoldrick v. Compagnie Generale*, 309 U.S. 430, 434, 60 S.Ct. 670, 672 (1940). The Petitioner below argued that the power to award visitation in this context must be specifically expressed in a state statute and that no statute does so. The SJC agreed that no specific statute covered this factual situation, but disagreed that the absence meant no relief for E.N.O. App. 5 n.3. Rather, the SJC held that the legislature's statutory grant of equity jurisdiction to the Family Court was broad enough to encompass the temporary visitation order in this case. App. 6-7. In short, the SJC interpreted Massachusetts statutory law more expansively than Petitioner believed proper. The Petitioner's argument went no further. Specifically, at no time did Petitioner assert that if the SJC affirmed the Family Court's exercise of its admittedly broad equity jurisdiction (which jurisdiction is conferred by statute), then such exercise would contravene federal separation of powers principles. App. 5-8. For this simple reason alone, Question One is not properly presented for review.

Even assuming Question One was properly pressed or passed on below, the Petitioner presents no federal constitutional claim in raising an issue of supposed state separation of powers violations by the SJC's decision.

States' freedom from federal separation of powers constraints is an essential ingredient of federalism. *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 615 & n.13, 94 S.Ct. 1323, 1331 & n.13 (1974); *Sweezy v. New Hampshire*, 354 U.S. 234, 255, 77 S.Ct. 1203, 1214 (1957) ("the concept of separation of powers embodied in the United States Constitution is not mandatory in state governments.") (citing *Dreyer v. Illinois*, 187 U.S. 71, 84, 23 S.Ct. 28, 32 (1902)).

Nothing in the federal constitution prevents a state from allocating lawmaking powers to the courts. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 479-81, 101 S.Ct. 715, 732 (1981) (Stevens, J., dissenting on other grounds) ("I know of nothing in the Federal Constitution that prohibits a State from giving lawmaking power to its courts. . . . The functions that a state court shall perform within the structure of state government are unquestionably matters of state law."); *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612, 57 S.Ct. 549, 551 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself.") (Cardozo, J.).[3]

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[3] The dissent below is simply mistaken when it complains the SJC decision infringes on the province of the legislature. App. 17. While the dissent may prefer the legislature make such decisions as a matter of policy, the dissent is not complaining of a constitutional violation. The equitable powers exercised by the Family Court and affirmed by the SJC were granted to the courts by the Massachusetts Legislature. 1963 Mass. Acts ch. 820, § 1. App. 5. In any event, if the Legislature disagrees with the rule of law announced in the *E.N.O.* decision, it may modify that decision.

As a result, even assuming for the sake of argument alone that the SJC arrogated a power properly belonging to the Legislature (or that the Legislature improperly delegated broad lawmaking powers to the SJC), that is no concern of this Court.

Finally, it is not this Court's role – because it would be inordinately disruptive – to inject itself into the law-making process in Massachusetts or any other state. Any claim of novelty concerning the decision below is nothing more that the discomfort over the evolution of the common law, a discomfort aroused by the Massachusetts courts' vigorous exercise of their equitable powers over the years.[4] *See e.g. Wright v. Wright*, 2 Mass. 109 (1806) (court exercised discretionary powers to place "bastard" child with the mother rather than to make the child a ward of the Commonwealth); *Gardner v. Rothman*, 370 Mass. 79, 80, 354 N.E.2d 370, 371-72 (1976) (upholding court's equitable powers to allow unwed fathers to make claims for visitation with their children before Massachusetts enacted a paternity statute); *C.C. v. A.B.*, 406 Mass. 679, 550 N.E.2d 365 (1990) (using equity to allow standing to a putative father where the mother of the child was married to another man); *Youmans v. Ramos*, 429

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[4] The Family Court's use of its equitable and parens patriae powers to achieve a just result for the child enjoys an historical pedigree in Massachusetts and elsewhere. *Compare* App. 6-8 with App. 17 and Petition 13-15. *See generally*, Michael Grossberg, GOVERNING THE HEARTH 236-37, 255-59 (1985); *Ins. Co. v. Bangs*, 103 U.S. 435, 438 (1880) (explaining origin of the doctrine which allows courts to act as the protector of the persons and estates of children).

Mass. 774, 711 N.E.2d 165 (1999) (upholding court's equitable powers to award visitation between a child and the aunt who had raised her for eleven years after the child's father resumed custody).[5]

Therefore, this Court should not interfere with the development of state common law.

III. THE PARENTAL RIGHTS ISSUE SET FORTH IN QUESTION TWO TURNS ON MATTERS OF STATE LAW AND PRESENTS NO SUBSTANTIAL FEDERAL QUESTION WHERE THE SJC AFFIRMED THE POWER OF THE FAMILY COURT, SITTING IN EQUITY, TO CONSIDER A CHILD'S BEST INTERESTS IN ALLOWING TEMPORARY VISITATION BETWEEN THE CHILD AND HIS DE FACTO PARENT.

The precise constitutional question presented is whether L.M.M.'s federal due process rights are absolute

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[5] There is nothing odd about the result the SJC reached in *E.N.O.* compared with the decision in *C.M. v. P.R.*, 420 Mass. 220, 649 N.E.2d 154 (1995). *Compare* App. 10-11 to App. 18, 21-22. The instant case proceeded on a lengthy verified complaint accompanied by multiple exhibits all demonstrating the parental nature of the relationship between E.N.O. and B.O.M. By contrast, the record in C.M.'s case "consist[ed] of a complaint filled in by check marks on a form and the admission by the plaintiff that he is not the biological father." 420 Mass. at 220 n.1, 649 N.E.2d at 154 n.1. The SJC refused C.M. equitable relief reasoning that "[h]is devotion to the child does not, without more, permit an adjudication of paternity or visitation privileges." 420 Mass. at 223, 649 N.E.2d at 156. The cases are easily reconciled by the fact that this case presents the "more" that was missing in *C.M.*

or nearly so, enabling her to bar visitation between B.O.M. and E.N.O. where the state courts have found E.N.O. to be a de facto parent and that contact (at least on a temporary basis) would be in the child's best interests.

This question was not pressed by Petitioner below. L.M.M. never asserted that it would be unconstitutional for the SJC to find E.N.O. to be a de facto parent, but instead characterized the case as one involving a third party's intrusion on parental rights. In answering that latter question, the SJC balanced the interests of the child in maintaining contact with E.N.O. against the asserted rights of L.M.M. App. 14-15. But the SJC, for want of proper presentation, has never had the opportunity to consider whether there are restraints on its ability to fashion rules defining de facto parenthood at all.

Even assuming a question is properly presented to this Court, it is axiomatic that parental rights are not absolute. *Lehr v. Robertson*, 463 U.S. 248, 103 S.Ct. 2985 (1985); *Wisconsin v. Yoder*, 406 U.S. 205, 215, 92 S.Ct. 1526, 1533 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 442 (1944). Nor does this case involve the state attempting to break up a family or terminate parental rights. *M.L.B. v. S.L.J.*, 519 U.S. 102, 118, 117 S.Ct. 555, 564 (1996); *Santosky v. Kramer*, 455 U.S. 745, 768-69, 102 S.Ct. 1388, 1402-03 (1982).[6] Disputes over visitation between

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[6] *Compare Rivera v. Minnich*, 483 U.S. 574, 579-81, 107 S.Ct. 3001, 3004-06 (1987) (due process requires only preponderance of evidence standard of proof in paternity proceedings as opposed to more stringent clear and convincing standard required in termination proceedings because imposition of parent-child obligations is a less severe consequence than termination of rights).

parents, as is the case here, do not partake of the constitutional concerns raised in visitation cases involving third parties. *See e.g. Jacobs v. Jacobs*, 507 A.2d 596 (Me. 1986). The result of the SJC decision is simply to give some recognition to the family unit the child has known his entire life. *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S.Ct. 549, 555 (1978), reh. den. 435 U.S. 918, 98 S.Ct. 1477 (1978).[7]

More particularly, any federal question concerning whether a state's acknowledgement of parental rights in a non-biological parent infringes on a biological parent's rights presented in this case has already been asked and answered by *Michael H. v. Gerald D.*, 491 U.S. 110, 109 S.Ct. 2333 (1989) (plurality). That case addressed whether a California evidence rule in paternity cases deprived a putative father of his liberty interest in maintaining a relationship with a child he biologically fathered where the child's mother was married to another man at the time of conception and birth. The evidence rule provided that a child born to a married woman living with her husband, who is neither impotent nor sterile, is presumed to be a child of the marriage; and the presumption could

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[7] *Quilloin* upheld a Georgia adoption statute which allowed a woman and her new husband to adopt the child she had previously had with another man over that man's objection. Due process was satisfied by the findings that the adoption, and denial of the former partner's request for legitimation, were in the best interests of the child. *Id.* 434 U.S. at 255, 98 S.Ct at 555. As this Court stated, "[T]he result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except appellant [i.e, the biological father]." *Id.*

be rebutted only in very limited circumstances by either the husband or the mother. *Id.* 491 U.S. at 115, 109 S.Ct. at 2338. Absent those circumstances, the presumption was irrebuttable regardless of the actual identity of the biological father; and he had no ability to challenge the presumption. In other words, California had enacted a substantive rule of law eliminating any facts about biological paternity as an issue. *Id.*, 491 U.S. at 119, 109 S.Ct. at 2340.

Unable to satisfy the conditions of the California statute which would trigger the right to rebut the presumption of the husband's paternity, the biological father claimed a deprivation of liberty. This Court rejected his claim and deferred to California's overriding social policy concerns about support for the child and maintaining the integrity of the family unit. *Id.*, 491 U.S. at 119-20, 109 S.Ct. at 2340. The fact that the evidence rule preferred the husband and precluded the biological father from rebutting the presumption of the husband's paternity raised no constitutional concern. *Id.*, 491 U.S. at 130, 109 S.Ct. at 2345. "It is a question of legislative policy and not constitutional law whether California will allow the presumed parenthood of a couple desiring to retain a child conceived within and born into their marriage to be rebutted." *Id.*, 491 U.S. at 129-30, 109 S.Ct. at 2345. Stated differently, in *Michael H.*, this Court answered that it would defer to state laws crafting an acknowledgement of parental rights, even if those parents may not be biologically related to their children. *See also Lehr v. Robertson*, 463 U.S. 248, 262-63, 103 S.Ct. 2985, 2994 (1985).

Just as this Court recognized California's power to define a non-biological husband as a parent, the same

must hold true for Massachusetts and its conclusion that E.N.O. is a de facto parent. Just as California sought to protect the unitary family, the Massachusetts courts have sought to protect the family of the Petitioner, Respondent and their child. App. 9. The *E.N.O.* decision follows from strong and long-evolving child-protective principles in Massachusetts law. App. 9, 15-16.[8] It makes not a whit of difference that the rule of law at issue was articulated through a court decision rather than a statute where the decision is consistent with other positive law in the Commonwealth. *See e.g.* MASS. GEN. L. ch. 209C, § 1 (children born to unmarried parents shall have the same rights and protections of the law as all other children). There is nothing more to review here than in the myriad other

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[8] The Massachusetts standards for establishing de facto parenthood are stringent and provide a tight screening mechanism.

> A de facto parent is one who has no biological relation to the child, but has participated in the child's life as a member of the child's family. The de facto parent resides with the child and, with the consent and encouragement of the legal parent, performs a share of caretaking functions at least as great as the legal parent. . . . The de facto parent shapes the child's daily routine, addresses his developmental needs, disciplines the child, provides for his education and medical care, and serves as a moral guide.

App. 8-9. Even if one is a de facto parent, the child's relationship with the de facto parent must be further evaluated in determining what is in the child's best interests. *See C.C. v. A.B.*, 406 Mass. 679, 550 N.E.2d 365 (1990) (setting forth factors).

cases and statutes allocating parental responsibilities or prerogatives to persons who, while parents, are not biological or adoptive parents.[9] As this Court stated in

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[9] Despite the old common law rule that stepparents have no duty to support their stepchildren, several states have imposed just such an obligation despite the absence of a biological or adoptive link between the stepparents and children. Sometimes the duty is generalized and indefinite while other states provide the duty may be terminated upon divorce. *See e.g.* MO. REV. ST. § 453.400 (1998); N.D. CENT. CODE § 14-08-09 (1999); S.D. CODIFIED LAWS ANN. § 25-7-8 (1999); UTAH CODE ANN. § 78-45-4.1 (1999); WASH. REV. CODE ANN. § 26.16.205 (1998). Some states impose the obligation of support on stepparents only when the parents are unable to meet the minimum needs of the child. *See e.g.* DEL. CODE ANN. tit. 13, § 501 (1998); VT. STAT. ANN. tit. 15, § 296 (1999). Some states take into account the income of the current spouses or associates of a party in modifying child support obligations or deviating from state support guidelines. *See e.g.* CAL. FAM. CODE § 4059 (1999); ME. REV. STAT. ANN. tit. 19, § 2007 (3)(J) (1999); *Logan v. Logan*, 120 N.H. 839, 424 A.2d 403 (1980). Still other states require the stepparent to support families receiving public assistance or allow the state to recover the expenses of public support from stepparents. *See e.g.* KY. REV. STAT ANN. § 205.310 (1999); NEB. REV. STAT. § 43-512 (2) (1998); N.H. REV. STAT. ANN. § 167:2 (1998); UTAH CODE ANN. § 62A-11-303 & 307.1 (1999); WASH. REV. CODE ANN. § 74.20A.020 (7) (1998); WIS. STAT. ANN. § 49.195 (1999). Some states use principles of equitable estoppel to bar a divorcing stepparent from denying a post-divorce obligation to support his or her stepchildren. *See e.g. Miller v. Miller*, 478 A.2d 351, 357-58 (N.J. 1984). Finally, some states have held stepparents liable for post-divorce support through contract. *See Dewey v. Dewey*, 969 P.2d 1154 (Alaska 1999); *Dewey v. Dewey*, 886 P.2d 623 (Alaska 1994); *Duffey v. Duffey*, 438 S.E.2d 445 (N.C. App. 1994).

In all likelihood, stepparents and others required to support children to whom they are not biologically or legally related have some rights of visitation. *See C.M. v. P.R.*, 420 Mass. 220, 224 n.7, 649 N.E.2d 154, 156 n.7 (1995) ("in fairness and logic," a

Palmore v. Sidoti, granting parental rights "based on the best interests of the child is indisputably a substantial governmental interest." 466 U.S. 429, 433, 104 S.Ct. 1879, 1882 (1984) (equal protection analysis).

In addition to federalism concerns, as a matter of judicial restraint, this Court should be extremely loath to intrude upon, or re-open, questions of state law. *Santosky v. Kramer*, 455 U.S. 745, 770, 102 S.Ct. 1388, 1403-04 (Rehnquist, J., dissenting) (domestic relations "has been left to the States from time immemorial, and not without good reason"); *DeSylva v. Ballentine*, 351 U.S. 570, 580, 76 S.Ct. 974, 980 (1956) (state law controlling on meaning of term "child" in federal copyright statute). The fact that states may view these matters differently shows that our federal system is working. *Santosky*, 455 U.S. at 773, 102 S.Ct. at 1405 (Rehnquist, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.") (quoting *New State Ice Co., v. Liebmann*, 285 U.S. 262, 311, 52 S.Ct. 371, 386 (1932) (Brandeis, J., dissenting)).[10]

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person required to support a child "should be entitled in return to assert rights of custody and visitation.").

Sibling visitation statutes are another area in which several states have seen fit to limit a parent's right to bar visitation which is in the child's best interests. *See e.g.* ARK. CODE ANN. § 9-13-102 (1999); CAL. FAM. CODE § 3102 (West 1998); N.J. REV. STAT. ANN. § 9:2-7.1 (1999); N.Y. DOM. REL. LAW § 71 (1999); R.I. GEN. LAWS § 15-5-24.4 (1998).

[10] *Cf. Palmore v. Sidoti*, 466 U.S. 429, 431-32, 104 S.Ct. 1879, 1881 (1984) (while custody case is "not ordinarily a likely

Finally, contrary to Petitioner's assertion, there is no relevant conflict, vis-a-vis this Court's role, among the states on the issue decided below. What does exist is variety among each state's legal structures reflecting in each case a unique blend of common law, statutes, and different balances of power as between the courts and legislatures. In accord with each state's unique structure concerning law and policy, resolutions of particular cases like the one here will inevitably be decided differently.[11] That is no concern of this Court; again, it is an example of the state laboratories in action.

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candidate for review by this Court[,]" the case raised "important federal concerns arising from the Constitution's commitment to eradicating discrimination based on race.").

[11] Cases cited by L.M.M. from other jurisdictions in which courts denied standing to a person in E.N.O.'s position all involved the interpretation of particular statutes in those states where the statutory schemes were deemed exclusive. *See e.g. West v. Superior Court*, 69 Cal.Rptr.2d 160, 162 (1997) (turning on interpretation of the Uniform Parentage Act); *Lynda A.H. v. Diane T.O.*, 673 N.Y.S.2d 989, 991 (1998) (turning on exclusivity of New York statutory scheme); *Alison D. v. Virginia M.*, 77 N.Y.2d 651, 572 N.E.2d 27 (1991) (same); *Music v. Rachford*, 654 S.2d 1234, 1235 (Fla. 1995) (per curiam) (turning on lack of equitable authority to award visitation in courts); *Kulla v. McNulty*, 472 N.W.2d 175, 182 (Minn. App. 1991) (turning on interpretation of a visitation statute without even addressing court's equitable powers). By contrast, courts with broader equitable powers have issued rulings consistent with that of the SJC in this case. *See* Pet. at 17-18.

IV. THE PROCEDURAL DUE PROCESS ISSUE RAISED IN QUESTION THREE WAS NOT RAISED OR DECIDED BELOW, DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION, AND FAILS BECAUSE THE PETITIONER RECEIVED ALL OF THE PROCESS SHE WAS DUE.

Petitioners below did not assert a right to cross-examine the guardian ad litem based on any constitutional notion of procedural due process. While they did complain about being denied an opportunity to cross-examine the guardian ad litem at the hearing on the temporary visitation motion, the Petitioner did not raise, and the SJC did not consider or decide, the cross-examination issue in light of federal constitutional principles. Accordingly, this Court will not now take up the question. *Beck v. Washington*, 369 U.S. 541, 549-50, 82 S.Ct. 955, 960 (1962).

Nor does Question Three present a substantial federal question, especially where petitioner received notice of the temporary visitation motion, and a neutral hearing judge of the Massachusetts Family Court conducted a hearing on the matter at which counsel for both parties was heard. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313-314, 70 S.Ct. 652, 657 (1950). The guardian ad litem's report to the judge at the temporary hearing was an interim one and the parties will later have an opportunity to cross-examine the guardian ad litem on her complete and final report. *Gilmore v. Gilmore*, 369 Mass. 598, 341 N.E.2d 655 (1976). Requiring family courts at the initial temporary motion hearings to conduct those hearings with testimony and full cross-examination of court

appointed guardians ad litem would both increase the cost of the process dramatically and stall even temporary resolution of visitation and support matters for the child. While Massachusetts could elect to utilize such a process, it is not constitutionally required. *Matthews v. Eldridge*, 424 U.S. 319, 332-50, 96 S.Ct. 893, 901-910 (1976). In short, even if any procedural due process issue were raised by the case below, it fails to come within the class of cases deemed compelling for this Court's review.

CONCLUSION

The Petition should be denied.

RESPECTFULLY SUBMITTED this 27th day of October, 1999.

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